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No. 10-1056

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHN DOE, father of minor daughter, H.S.,
JANE DOE, mother of minor daughter, H.S.,
and H.S., a minor female,

Petitioners,

v.

SILSBEE INDEPENDENT SCHOOL DISTRICT,
RICHARD BAIN, JR., GAYE LOKEY,
SISSY McINNIS, DAVID SHEFFIELD,
RAKHEEM BOLTON, and CHRISTIAN ROUNTREE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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STATUTES

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Respondents to Petitioners' Petition for Certiorari are Silsbee Independent School District ("SISD"), Superintendent Richard Bain, Jr. ("Bain"), (former) Silsbee High School Principal Gaye Lokey ("Lokey"), (former) Cheerleader Sponsor Sissy McInnis ("McInnis"), and Hardin County District Attorney David Sheffield ("Sheffield"). SISD, Bain, Lokey, and McInnis are cumulatively referred to as "SISD."

Petitioners alleged the Respondents violated the First and Fourteenth Amendments to the United States Constitution.

The First Amendment claim is in two parts. As to SISD, Petitioners claim H.S.' protected expression of withholding cheers for Rakheem Bolton ("Bolton") at the free-throw line on February 27, 2009 was unconstitutionally restricted. Bolton and Christian Rountree ("Rountree") were not indicted on January 27, 2009, but both were indicted on November 24, 2009 for sexual assault of a minor (Plaintiffs'/Appellants' Opposed Motion to Take Judicial Notice on Appeal Pursuant to FRE 201; and Per Curiam Order granting the motion for judicial notice). The matters of this case occurred after Bolton and Rountree were not indicted by the first grand jury on January 27, 2009 but before both were indicted by the following grand jury in November 2009. As to Sheffield, Petitioners claim he retaliated against H.S. by stigmatizing her as having falsely claimed sexual assault by Bolton because of Sheffield's political relationship with Bolton's relative, Silsbee City Councilman Thomas Tyler.

On the week of February 16, 2009, Bolton was announced to have been selected to play on Silsbee High

School's basketball team. (Plaintiffs' First Amended Complaint, pg. 29 at ¶X5.) H.S.' father met with Bain on February 17, 2009, seeking unsuccessfully an accommodation which would insulate H.S. from Bolton. (*Id.*, pg. 30 at ¶B6.) At the following game, H.S. was faced with the decision of whether to cheer for the man she had accused of raping/sexually assaulting her, and against whom she had testified. Confronting the circumstances of his appearance and his presence, H.S., while cheering for the team, chose not to cheer when Bolton stood alone at the free-throw line. (*Id.*, ppg. 29-30 at ¶¶Y5-Z5.)

On February 27, 2009, at a post season and out-of-town game, H.S. again cheered for the team as a whole, but stood silent or sat quietly by McInnis when Bolton stood alone at the free-throw line. (*Id.*, pg. 30-31 at ¶C6.) There was no disruption of the game or ongoing academic processes. (*See Id.*, ppg. 30-31 at ¶¶Z5, C6, pg. 36 at ¶A7(2)(b), pg. 39 at ¶F7(2), pg. 41 at ¶C.) H.S. was called from the gym and told that she must endorse Bolton with her cheers or go home to Silsbee (*Id.*, pg. 31 at ¶¶D6-F6), approximately 100 miles away (not "nearby").

As generally recognized by the Court of Appeals and conceded by SISD, H.S. and her parents had entered into a written contract with the SISD. That contract specifically governed H.S.' conduct, discipline, and conditions of removal from the cheerleading squad, and did not condition H.S.' squad membership on cheering for players such as Bolton when at the free-throw line. (*See Id.*, ppg. 4-8 at ¶¶E-L, O-P.)

To be protected, speech or conduct must have a message. The Court of Appeals assumed for the purposes

of argument that, when remaining silent while her accused attacker, Bolton, tossed the basketball from the foul line, H.S.' conduct on February 27, 2009 had a message. (Petition for Writ of Certiorari, Appendix ["Pet. App."], ppg. 6a-7a.) SISD, in their Brief in Opposition ("SISD BIO"), says the message was "disdain" for Bolton and, inferentially, his inclusion on the team. Student speech is not protected and may be restricted only if it substantially interferes with the work of the school or requires a school to promote speech which may be inconsistent with an identified, legitimate pedagogical purpose.

The Court of Appeals, while assuming that H.S.' conduct carried an understandable message, said H.S. was the mouthpiece of the school, contractually bound to cheer for Bolton, and her refusal to do so was disruptive. (Pet. App., ppg. 5a, 7a.) There was no other attempt to locate or fashion a legitimate pedagogical purpose.

In their BIO, SISD embellished and trivialized the facts. They embellished "disruption" by arguing variously H.S.' conduct or her father, Petitioner John Doe, caused spectator outrage and substantial disruption in the stands, when the record and any allowable sources are to the contrary. SISD trivializes by saying H.S. was only suspended for two games, when in fact she was removed from the team, by the rules which meant expulsion forever. The *forever* was reversed by Bain when Bolton's planned team appearances were cut short by the UIL on March 6, 2009, and Bolton's judicial probation for truancy was revoked on March 12, 2009, leaving nothing for Bolton to do athletically at Silsbee High School. It is a reasonable inference that Bain, who had sustained H.S.' *removal*--not suspension--from the cheerleading squad, reversed

himself on the logic, "Might as well let her try out for next year, since there's nothing else Bolton can do this year." Since there was no disruption occasioned by H.S.' conduct in the record or from any allowable source, and H.S. was not contractually bound to cheer for Bolton at the free-throw line--or cheer all the time under all circumstances--then SISD unconstitutionally restricted her speech and conduct. SISD's claims of contractual obligation to cheer and disruption in the stands are disingenuous post-event constructions.

Petitioners' Fourteenth Amendment or due process and equal protection claims, as to SISD, are that H.S. had a constitutionally protected interest in the document recognized by the Court of Appeals and SISD to be a binding contract. While the Court of Appeals was erroneously persuaded by SISD that the cheerleading contract contained language not in the record and which conditioned H.S.' squad membership on cheering for Bolton at the free-throw line, the protected interest claimed by H.S. was not a subjective or abstract *desire to participate* in the extracurricular activity of cheerleading, but objective and tangible expectation of benefit in *the contractual terms and conditions governing her discipline and removal* from the cheerleading squad. The Court of Appeals' reliance on *NCAA v. Yeo*, 171 S.W.3d 863, 865 (Texas 2005) is inapposite.

As for the equal protection claims against SISD, H.S. claimed disparate treatment of H.S. *vis a vis* Bolton. Bolton was an adjudicated truant, accused of sexually assaulting H.S. and breaking a window in the Riley house to escape (with Rountree), who had lied to cover up his guilt, threatened to kill others, and threatened his teacher,

Dr. Shae Robinson, on March 2, 2009 with his "AK47." (*Id.*, pg. 16 at ¶J3, pg. 31 at ¶¶G6-H6, ppg. 34-36 at ¶¶T6, X6-Y6.) For his misconduct, SISD policies and rules were not followed, to Bolton's benefit, and his punishment for threatening Dr. Robinson on March 2, 2009 was reduced to two days of in-school suspension. That "punishment" started on March 5, 2009 *after* Bolton had played in the March 4, 2009 game, and so arranged that, with a shortened school day on March 6, 2009, he was able to board the team bus for that day's game. (*Id.*, ppg. 31-36 at ¶¶G6-J6, O6[2]-Q6, T6, X6, Y6.)

Petitioners also claim that H.S. had a protected interest, as to SISD, as a minor who had been a victim of a sexual assault (by Bolton), to be free from false stigmatization (as having falsely reported the assault), coupled with SISD's exacerbation of H.S.' psychological harm, by publicly compelling her to publicly cheer her claimed attacker (who was still under investigation and would be subsequently indicted).

Petitioners claim that H.S. had a protected interest, as to Sheffield, as a minor who had been a victim of sexual assault (by Bolton), to be free from false stigmatization (as having falsely reported the assault) through thinly veiled criticism of her credibility to the newspaper (Plaintiffs' First Amended Complaint, pg. 37 at ¶C7(1)), and dispersal into the community by Horka (*Id.*, ppg. 24-25 at ¶¶D5-I5), coupled with deprivation of H.S.' legally imposed privacy as a witness and victim before a grand jury. It may be reasonably inferred that Sheffield (a trained prosecutor), who was arguably interested in benefiting Bolton, the family member of a political supporter, from future indictment, would violate notorious statutory

proscriptions and dismiss the victim's claim of the crime. There was no legitimate prosecutorial function behind Sheffield's actions. There was no reason for Sheffield to emphasize his view of Bolton's innocence and H.S.' unfounded charge in his post-grand jury comments to the newspaper and the Horkas, other than the emphasis of Bolton's innocence and H.S.' unbelievability.

H.S. urges Tex. Code Crim. Proc. Art. 20.02 is the source of a tangible (privacy) interest which, when coupled with governmental stigmatization imposes liability.

Petitioners claim that H.S. had a protected interest, as to Sheffield, as a minor who had been a victim of sexual assault (by Bolton), to be free from false stigmatization (as having falsely reported the assault) coupled with further intended psychological harm (at the hands of Sheffield) by being publicly discredited as having falsely cried rape or sexual assault.

Board of Regents v. Roth, 408 U.S. 564 (1972) and its progeny state that the protected interests and the protected parameters thereof are found in state law, etc. Texas law, although perhaps idiosyncratic to other law, states that physical injury is not required for a protected right to exist. *Spacek v. Charles*, 928 S.W.2d 88 (Tex. App.--Houston [14th] 1996).

SISD'S MISSTATEMENTS OF FACT

"[A]ll well pleaded facts" stated in [Petitioners'] First Amended Complaint are to be taken "as true and viewed in the light most favorable to the [Petitioners]." (Pet. App., pg. 3a.) In their BIO, SISD states, without any referencing citation and allowable record support, the following, and Petitioners respond:

1. SISD states, "During the previous game [at the February 27, 2009 game at the Huntsville venue] *cheerleader sponsor McInnis had admonished H.S.* that the *school's cheerleader Constitution required her* . . . to cheer during games for all players who were part of the team." (SISD BIO, pg. 1.) (Emphasis added.)

   Petitioners respond:

   No fact pleaded in Petitioners' amended complaint, or found in allowable proof otherwise supplied, supports the proposition that H.S. was contractually required to cheer for Bolton when at the free-throw line, lest she be removed from the cheerleading squad. (*See* Plaintiffs' First Amended Complaint, ppg. 4-9 at ¶¶E-F, H-I, K-L[2][1], O-S.)

2. SISD states, "On *at least three occasions* during the Huntsville game, and despite *sponsor McInnis' earlier admonition*, H.S. remained seated and silent . . . ." (SISD BIO, pg. 1.) (Emphasis added.)

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1. A paragraph numbering error resulted in two consecutive paragraphs being designated "L." For purposes of this brief, the first is referred to as "L[1]" and the second is referred to as "L[2]."

Petitioners respond:

No fact pleaded in Petitioners' amended complaint or found in allowable proof otherwise supplied supports SISD's statement that H.S. was previously admonished for her silent, non-disruptive expression. (*See* Plaintiffs' First Amended Complaint, ppg. 29-30 at ¶¶Y5-B6.)

3. SISD states, "When H.S. chose not to stand and cheer for Bolton, Silsbee High School *students and other supporters, including Bolton's family and friends, voiced their outrage at H.S.'s conduct.* Petitioner John Doe, H.S.'s father, was present as well, and *his responses to those students and Bolton family members who opposed H.S.'s demonstration of disrespect produced a major disruption in the stands, eventually involving the Huntsville police.*" (SISD BIO, pg. 2.) (Emphasis added); and "As noted, Petitioner *H.S.'s conduct produced a significant disruption* among her fellow students attending the game. Silsbee High School *team supporters raised an outcry in protest of her disdainful behavior toward the team and one of its members.* [H.S.'] father, *Petitioner John Doe, responded, and the Huntsville police became involved. . . . H.S.'s educational environment-disrupting conduct . . . .*" (*Id.*, pg. 11.) (Emphasis added).

Petitioners respond:

No fact pleaded in Petitioners' amended complaint or found in allowable proof otherwise supplied supports SISD's claim that H.S.' silent, symbolic protest caused *any* disruption or outcry in the audience at

the basketball game. (*See* Plaintiffs' First Amended Complaint, ppg. 30-31 at ¶¶C6-F6.)

4. SISD states, "H.S. was then *suspended from the cheer squad for two games*. No other disciplinary action was taken against her. Following her *brief suspension from the squad*, H.S., at the request of her father, was reinstated to the squad by Respondent Superintendent Bain." (SISD BIO, pg. 2.) (Emphasis added.)

Petitioners respond:

No fact pleaded in Petitioners' amended complaint or found in allowable proof otherwise supplied supports SISD's argument that H.S. was "suspended" briefly for only two games. H.S. was removed from the cheerleading squad, which had the effect of removing her for the balance of her school career. When Bolton was kept from playing the March 6, 2009 post-season game and his truancy probation revoked on March 12, 2009, Bain reversed and lifted the ban on H.S.' future participation with the cheerleading squad. (*See* Plaintiffs' First Amended Complaint, ppg. 32-33 at ¶¶L6-N6, ppg. 34-35 at ¶¶P6-T6, W6.)

CLAIMED MISSTATEMENTS OF FACT AND SCANDALOUS MATTER

SISD object to four statements by Petitioners which they claim are not part of the record, as well as being being "misstatements of fact," and "irrelevant and immaterial to the issues raised in the Petition, and . . . refer[ring] to scandalous matter." (SISD BIO, ppg. 3-4.) The claimed "misstatements" are good faith, reasonable paraphrases of paragraphs in Petitioners' amended complaint, which

relate to H.S.' claims and are part of the record. (*See* Plaintiffs' First Amended Complaint, ppg. 17-18 at ¶O3, pg. 26 at ¶L5-M5.)

SISD claim that five other references are "scandalous" and "irrelevant and immaterial to the issues raised in the Petition . . . ." (SISD BIO, pg. 4.) Petitioners respond that the genesis of this action was the claimed rape/sexual assault of H.S. on October 18, 2009, and that indictments, although not returned by the first grand jury on January 27, 2009, were subsequently returned against Bolton and Rountree by a grand jury in November 2009, which indictments the Court of Appeals noticed on motion by Petitioners. (*See* Plaintiffs'/Appellants' Opposed Motion to Take Judicial Notice on Appeal Pursuant to FRE 201; and Per Curiam Order granting the motion for judicial notice.) The matters claimed are not scandalous and relate to H.S.' claims against Respondents and other defendants, and the background of the claims.

SISD's objections should be denied. The petition for writ of certiori should be granted.

Respectfully submitted,

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